

POSTED ON WEBSITE  
NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

In re ) Case No. 10-53637-E-13

G. WENDELL ULBERG and )  
KATHLEEN M. ULBERG, )

Debtor(s). )

G. WENDELL ULBERG and )  
KATHLEEN M. ULBERG, )

Adv. Pro. No. 11-2122  
Docket Control No. SW-1

Plaintiff(s), )

v. )

BANK OF AMERICA, N.A., et )  
al., )

Defendant(s). )

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM OPINION AND DECISION

G. Wendell Ulberg Jr. and Kathleen M. Ulberg ("Plaintiff-Debtors") commenced this Adversary Proceeding against Bank of America, N.A., Pacific Crest Partners, Inc. ("Pacific Crest"), John Mudgett ("Mudgett"), and Recontrust Company, N.A. ("Recontrust") concerning ownership of real property commonly known as 1382 Mineral Springs Trail, Alpine Meadows, California (the

1 "Property"). Through this litigation the Plaintiff-Debtors seek to  
2 establish that they and their Chapter 13 bankruptcy estate are the  
3 owners of the Property, having ownership interests superior to  
4 those of the Defendants.

5 The Motion to Dismiss causes of action in this Adversary  
6 Proceeding was properly noticed and set for hearing before this  
7 court. The Plaintiff-Debtors' having filed an opposition, the  
8 court will address the merits of the motion. Bank of America, N.A.  
9 seeks to dismiss this adversary proceeding for failure to state a  
10 claim. Fed. R. Civ. P. 12(b)(6) *incorporated by* Fed. R. Bankr. P.  
11 7012. Bank of America, N.A. argues that:

- 12 1. Plaintiff-Debtors have not pled sufficient grounds to  
13 allege fraud or negligent misrepresentation;
- 14 2. Plaintiff-Debtors failed to show unfair business  
15 practices on the part of Bank of America, N.A.;
- 16 3. Plaintiff-Debtors cannot set aside, rescind or cancel the  
17 Trustee's Deed;
- 18 4. Plaintiff-Debtors cannot quiet title without paying their  
19 loan; and
- 20 5. Declaratory relief is not a cause of action so therefore,  
21 it is not an appropriate remedy.

22 The court's decision is to grant the Motion to Dismiss in part and  
23 deny the Motion in part.

24 Mudgett and Pacific Crest filed a "joinder" to Bank of  
25 America, N.A.'s Motion to Dismiss. The attempted joinder is not  
26 procedurally proper. The "Joinder" does not fit the requirements  
27 for joinder, see Fed. R. Bankr. P. 7018-7020. The joinder is  
28 overruled for procedural defects but those Defendants may file in  
the future such proper pleadings as they determine appropriate  
under the Federal Rules of Civil Procedure and the Federal Rules of

1 Bankruptcy Procedure.

2 **REQUEST FOR JUDICIAL NOTICE**

3 Bank of America, N.A. requests that the court take judicial  
4 notice of documents offered with its motion to dismiss:

5 A. Deed of Trust

6 B. Substitution of Trustee

7 C. Notice of Default

8 D. Notice of Trustee's Sale

9 E. Certificate of Sale at Public Auction

10 F. Trustee's Deed Upon Sale

11 G. PACER Docket of Bankruptcy Case No. 10-53673-E-13L

12 While a majority of the documents offered provide evidence of  
13 having been filed with the court or recorded by the relevant county  
14 recorder, the documents labeled Exhibits B, D, and E, see Dckt. 54,  
15 do not bear evidence from the relevant county recorder that the  
16 documents were filed. Exhibits B and D show that they were sent  
17 off to be recorded but they do not reflect that they actually have  
18 been. Exhibit E has no markings that even suggest it was even sent  
19 off to be recorded.

20 Where certain indisputable facts are so within the common and  
21 general knowledge of the community, or capable of accurate and  
22 ready determination by resort to sources whose accuracy cannot  
23 reasonably be questioned, the judicial notice doctrine serves as a  
24 substitute for formal proof. A judicially noticed fact must be one  
25 not subject to reasonable dispute in that it is either  
26 (1) generally known within the territorial jurisdiction of the  
27 trial court or (2) capable of accurate and ready determination by  
28 resorting to sources whose accuracy cannot be reasonably be

1 questioned. Fed. R. Evid. 201(b). Even where a fact may not be of  
2 common knowledge, so long as the fact is capable of immediate and  
3 accurate determination from a credible source, a court may take  
4 judicial notice. *Id.*, at 201(b)(2).

5 No formula exists for determining the appropriate use of  
6 judicial notice under Federal Rule of Evidence 201(b)(2). See  
7 2 MCCORMICK ON EVID. 11 § 330 (6th ed.). Frequently, courts utilize  
8 judicial notice with regard to information contained in public  
9 records. *Mack v. S. Bay Beer Distrib.*, 798 F. 2d 1279, 1282  
10 (9th Cir. 1986), *abrogated in part on other grounds by Astoria*  
11 *Federal Savings and Loan Ass'n v. Solimino*, 501 U.S. 104 (1991).

12 The documents labeled Exhibits B, D, and E do not show that  
13 they were in fact recorded with the relevant county recorder.  
14 Therefore, there is no evidence that the documents are contained in  
15 public records. The court will take judicial notice of Exhibits A,  
16 C, F, and G in Docket No. 128. The request for judicial notice of  
17 Exhibits B, D, and E is denied without prejudice.

#### 18 **FACTUAL ALLEGATIONS IN FIRST AMENDED COMPLAINT**

19 Plaintiff-Debtors allege they were the owners of the Property  
20 and have lived there since 1986. The Property was subject to two  
21 claims held by Bank of America, N.A. and secured by trust deeds:  
22 one claim with a balance of \$218,741.00 and a second with a balance  
23 of \$151,186.00. Plaintiff-Debtors submitted a loan modification  
24 application to Bank of America, N.A. under the HAMP program in June  
25 2010. Plaintiff-Debtors represent that HAMP guidelines prohibit  
26 foreclosure sales while a loan is under HAMP review. Bank of  
27 America, N.A. allegedly represented to Plaintiff-Debtors that  
28 (1) during the time the loan modification was under review, they

1 would not foreclose on the property, (2) Bank of America, N.A.  
2 would send a Reinstatement letter in order to allow Plaintiff-  
3 Debtors to bring the account current, and (3) because Plaintiff-  
4 Debtors' loan modification request was still under review, Bank of  
5 America, N.A. had made a request for the postponement of the  
6 foreclosure sale which, at that time, was scheduled for  
7 December 27, 2010.

8 Allegedly in reliance on these representations, Plaintiff-  
9 Debtors stopped making payments while they awaited review of their  
10 loan modification and refrained from taking any other actions to  
11 protect their ownership in the Property, including not keeping  
12 their account current or filing for bankruptcy. Bank of America,  
13 N.A. also allegedly announced that there would be a moratorium on  
14 foreclosure sales effective December 27, 2010. On December 24,  
15 2010, Mudgett, a real estate salesperson for Pacific Crest, came to  
16 the property and told Plaintiff-Debtors that their Property would  
17 be foreclosed on December 27, 2010. Plaintiff-Debtors informed him  
18 that a loan modification was pending. Plaintiff-Debtors represent  
19 that on December 27, 2010 - prior to the sale - Recontrust, the  
20 trustee, was advised of Plaintiff-Debtors' bankruptcy and that  
21 Recontrust represented that the file would be put into bankruptcy  
22 status and that the sale would not proceed. However, Recontrust  
23 proceeded with the sale and the Property was purportedly sold to  
24 Pacific Crest for \$190,000.00.

#### 25 **THE ADVERSARY PROCEEDING**

26 The Plaintiff-Debtors filed this adversary proceeding on  
27 February 22, 2011. They then filed a First Amended Complaint  
28 ("FAC") on March 15, 2011. The FAC makes the following general

1 allegations:

- 2 1. Bank of America, N.A. fraudulently made representations  
3 with the intention of inducing Plaintiff-Debtors to rely  
4 on them to their detriment;
- 5 2. Bank of America, N.A. made representations which were  
6 false at the time they were made and which Defendant had  
7 no reasonable basis to believe were true;
- 8 3. The Plaintiff-Debtors relied on the alleged false  
9 representation to their detriment;
- 10 4. Bank of American, N.A. and Recontrust violated California  
11 Business and Professions Code section 17200 as the loan  
12 modification program was an immoral, unethical,  
13 oppressive and unscrupulous business practice that was  
14 substantially injurious to consumers;
- 15 5. Bank of America, N.A., by intentionally misrepresenting  
16 to Plaintiff-Debtors that the foreclosure sale would not  
17 occur, deprived Plaintiff-Debtors of their legal right to  
18 cure the default on their loan;
- 19 6. The foreclosure sale violated HAMP guidelines;
- 20 7. Recontrust, Mudgett, and Pacific Crest had actual  
21 knowledge that the purported foreclosure sale was  
22 improper and that Bank of American, N.A. could not have  
23 the Property sold at the nonjudicial foreclosure sale.
- 24 8. The Plaintiff-Debtors' title and interest in the Property  
25 is superior to that of Pacific Crest or what was  
26 purported to be transferred by and for Bank of America,  
27 N.A.

#### 19 ANALYSIS

20 In considering a motion to dismiss, the court starts with the  
21 basic premise that the law favors disputes being decided on their  
22 merits, and a complaint should not be dismissed unless it appears  
23 beyond doubt that the plaintiff can prove no set of facts in  
24 support of his claim which would entitle him to the relief.  
25 *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt  
26 with respect to whether a motion to dismiss is to be granted should  
27 be resolved in favor of the pleader. *Pond v. General Electric*  
28 *Company*, 256 F.2d 824, 826-827 (9th Cir. 1958). For purposes of

1 determining the propriety of a dismissal before trial, allegations  
2 in the complaint are taken as true. *Kossick v. United Fruit Co.*,  
3 365 U.S. 731, 731 (1961).

4 The complaint must provide more than labels and conclusions,  
5 or a formulaic recitation of a cause of action; it must plead  
6 factual allegations sufficient to raise more than a speculative  
7 right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555  
8 (2007). Federal Rule of Civil Procedure 8, made applicable to this  
9 adversary proceeding by Federal Rule of Bankruptcy Procedure 7008,  
10 requires that complaints contain a short, plain statement of the  
11 claim showing entitlement to relief and a demand for the relief  
12 requested. Fed. R. Civ. P. 8(a). As the Court held in *Bell*  
13 *Atlantic*, the pleading standard under Rule 8 does not require  
14 "detailed factual allegations," but it does demand more than an  
15 unadorned accusation or conclusion of a cause of action. *Bell*  
16 *Atlantic*, 550 U.S. at 555.

17 To survive a motion to dismiss, a complaint must contain  
18 sufficient factual matter, accepted as true, to state a  
19 claim to relief that is plausible on its face. A claim  
20 has facial plausibility when the plaintiff pleads factual  
content that allows the court to draw the reasonable  
inference that the defendant is liable for the misconduct  
alleged.

21 *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S. Ct. 1937, 1949, 173 L. Ed.  
22 2d 868, 884 (2009) (citations and quotation marks omitted). Rule  
23 8 also requires that allegations be "simple, concise, and direct."  
24 Fed. R. Civ. P. 8(d)(1).

25 In ruling on a 12(b)(6) motion to dismiss, the Court may  
26 consider "allegations contained in the pleadings, exhibits attached  
27 to the complaint, and matters properly subject to judicial notice."  
28 *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court

1 need not accept unreasonable inferences or conclusory deductions of  
2 fact cast in the form of factual allegations. *Sprewell v. Golden*  
3 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the  
4 court required to "accept legal conclusions cast in the form of  
5 factual allegations if those conclusions cannot be reasonably drawn  
6 from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d  
7 752, 754-55 (9th Cir. 1994).

#### 8 **Plaintiff-Debtors' Request for Leave to Amend**

9 In their opposition to Bank of America, N.A.'s Motion to  
10 Dismiss, Plaintiff-Debtors argue in the alternative for leave to  
11 amend their First Amended Complaint so as to better factually  
12 support their claims. However, a procedure of continually amending  
13 complaints is not one favored by the court. After an automatically  
14 allowed first amendment, further amendments shall be made with  
15 leave of the court, which must be requested by a separate, noticed  
16 motion detailing what Plaintiff-Debtors plan to include in their  
17 second amended complaint, with a copy of the proposed second  
18 amended complaint filed as an exhibit in support of the motion.

#### 19 **Fraud - First Cause of Action**

20 Plaintiff-Debtors argue that Bank of America, N.A., through  
21 multiple misrepresentations, fraudulently led them to believe that  
22 the foreclosure sale was not going to happen as long as their loan  
23 was under review for modification. Under California law, the  
24 elements of fraud are "(a) misrepresentation, (b) defendant's  
25 knowledge of the statement's falsity, (c) Intent to . . . induce  
26 action in reliance on the misrepresentation[], (d) justifiable  
27 reliance, and (e) resulting damage." *Flaxel v. Johnson*, 541 F.  
28 Supp. 2d 1127, 1145 (S.D. Cal. 2008) (quoting *Hunter v. Up-Right*,



1 Inc., 6 Cal. 4th 1174, 1184 (1993). When pleading fraud or mistake  
2 in a complaint, a party must state with particularity the  
3 circumstances constituting fraud or mistake. Fed. R. Civ. Pro.  
4 9(b). "A pleading is sufficient under Rule 9(b) if it identifies  
5 the circumstances constituting fraud so a defendant can prepare an  
6 adequate answer from the allegations." *In re Van Wagoner Funds,*  
7 *Inc. Securities Litigation*, 382 F. Supp. 2d 1173, 1180 (N.D. Cal.  
8 2004). The plaintiff has an obligation to "state precisely the  
9 time, place, and nature of misleading statements,  
10 misrepresentations, and specific acts of fraud." *Kaplan v. Rose*,  
11 49 F. 3d 1363, 1370 (9th Cir. 1994). Particularity requires a  
12 plaintiff to "set forth more than the neutral facts necessary to  
13 identify the transaction. The plaintiff must set forth what is  
14 false or misleading about a statement, and why it is false." *In re*  
15 *GlenFed, Inc. Securities Litigation*, 42 F. 3d 1541, 1548 (9th Cir.  
16 1994), *superseded by statute on other grounds*.

17 Bank of America, N.A. argues that Plaintiff-Debtors' complaint  
18 is filled with general allegations against 'defendants.' However,  
19 Plaintiff-Debtors' fraud claim is brought only against Bank of  
20 America, N.A. and the Doe Defendants and the three statements  
21 Plaintiff-Debtors allege were given fraudulently are attributed  
22 explicitly to Bank of America, N.A. and Bank of America, N.A.  
23 alone. Bank of America, N.A. then argues that Plaintiff-Debtors  
24 failed to properly prove justifiable reliance. Justifiable reliance  
25 "is a subjective standard focusing on the individual capacity of  
26 the plaintiff and circumstances of the case as opposed to an  
27 objective, 'community standard' of conduct." *Kaufman v. Tallant*  
28 (*In re Tallant*), 207 B.R. 923, 933 (Bankr. E.D. Cal. 1997),

1 reversed in part on other grounds sub nom. *Tallant v. Kaufman* (In  
2 re *Tallant*), 218 B.R. 58 (B.A.P. 9th Cir. 1998). Looking at the  
3 circumstances surround this case, Plaintiff-Debtors could be found  
4 to have plead plausible justifiable reliance on Bank of America,  
5 N.A.'s assertion that the foreclosure sale would be postponed and  
6 thereby were induced to stop making payments while their loan was  
7 under review or to not file bankruptcy to protect their ownership  
8 of the Property.

9 Bank of America, N.A. also argues that Plaintiff-Debtors have  
10 failed to meet the heightened pleading standard since they fail to  
11 identify who made which statements or state why the statements were  
12 misleading. As to the first part, Plaintiff-Debtors contend in  
13 their opposition that they failed to identify specific people  
14 because Bank of America, N.A. does not give out the names of those  
15 working in its loan modification program. The court notes that  
16 plaintiffs are given a little leeway in pleading when the necessary  
17 information is under the control of the defendant. 3 MOORE'S FEDERAL  
18 PRACTICE § 9.03[1][b]. However, plaintiffs are still required to  
19 provide factual allegations that make their claims plausible. *Id.*  
20 Within the small universe of people involved in the transaction  
21 involving this one loan and relating to the purported loan  
22 modification, the description is sufficient for purposes of a  
23 motion to dismiss. The evidential detail can be quickly obtained  
24 through discovery by the Defendants.

25 As to the second part, Plaintiff-Debtors point to which  
26 statements were false and detail how they relied on these  
27 misleading statements. "It is not sufficient simply to allege that  
28 a statement was false." *Ronconi v. Larkin*, 253 F. 3d 423, 431 (9th

1 Cir. 2001). However, "This falsity requirement can be satisfied by  
2 point to inconsistent contemporaneous statements or information  
3 . . . which were made by or available to the defendants." *Yourish*  
4 *v. California Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999) (quoting  
5 *Glenfed*, 42 F.3d at 1549). In the First Amended Complaint the  
6 Plaintiff-Debtors alleged that the statement that Bank of America,  
7 N.A. would not foreclose while the loan modification was in  
8 active review, that Bank of America, N.A. would send a  
9 reinstatement letter were false, and that the December 27, 2011  
10 foreclosure sale would be postponed. FAC ¶ 12. It is clear the  
11 universe of specific statements which are alleged not to be true.

12 The First Amended Complaint sufficiently alleges that Bank of  
13 America, N.A. intended to make the alleged representations, and  
14 that in doing so did with the intention that the Plaintiff-Debtors  
15 rely on the representations. It is not necessary for a plaintiff  
16 to provide a rote recitation of the elements of a tort, but such  
17 may be made as part of the allegations. The First Amended  
18 Complaint alleges that Bank of America, N.A. made the  
19 representations with the intention that the Plaintiff-Debtors rely  
20 upon them, ¶ 22, that the representations were false, ¶ 23,  
21 Plaintiff-Debtors reasonably relied upon the false representations,  
22 ¶ 24, and that Plaintiff-Debtors have suffered damages of at least  
23 \$100,000.00, ¶ 25. While Bank of America, N.A. disputes these  
24 allegations, such dispute does not warrant dismissal of the First  
25 Cause of Action.

26 The Motion is denied as to the First Cause of Action.

27 **Negligent Misrepresentation - Second Cause of Action**

28 Plaintiff-Debtors also argue that Bank of America, N.A. is

1 guilty of negligent misrepresentations for the same statements  
2 claimed under their fraud cause of action. When a plaintiff claims  
3 both fraud and negligent misrepresentation and "the two claims are  
4 factually inseparable, Rule 9(b) does govern the pleading  
5 requirements of the 'intertwined' non-fraud-based claim." *Kitchell*  
6 *v. Aspen Exploration, Inc.*, 562 F. Supp. 2d 843, 852 (E.D. Tex.  
7 2007) (citing *Am. Realty Trust, Inc. V. Travelers Cas. & Sur. Co.*,  
8 362 F. Supp. 2d 744, 752 (N.D. Tex. 2005)).

9 A claim for Negligent Misrepresentation is one where a  
10 defendant makes false statements, honestly believing that they are  
11 true, but without reasonable grounds for that belief. 5 WITKIN  
12 SUMMARY OF CALIFORNIA LAW, 10<sup>th</sup> Edition, Torts § 818. See California  
13 Civil Code § 1710, defining deceit. As discussed by the Ninth  
14 Circuit Court of Appeals, it is sufficient that the  
15 misrepresentation be recklessly made, without reasonable grounds or  
16 an honest belief that they are true, and made deliberately in such  
17 a way as to give the person to whom it is made reasonable grounds  
18 for supposing that it was meant to be acted upon and that person  
19 has acted on it accordingly. *Schwinn v. United States*, 112 F.3d  
20 74, 75 (9th Cir. 1040), aff'd 311 US 616 (1940).

21 The Negligent Misrepresentation tort replaces the scienter or  
22 intent to defraud requirement for actual fraud with the reckless,  
23 without reasonable grounds or honest belief element. *Goehring v.*  
24 *Chapman University*, 212 Cal. App. 4<sup>th</sup> 353, 364 (4th App. Dist.  
25 2004). The elements for a claim of Negligent Misrepresentation  
26 must plead with specificity that there was:

- 27 (1) the misrepresentation of a past or existing material  
28 fact,

- 1 (2) without reasonable grounds for believing it to be true,
- 2 (3) with intent to induct another's reliance on the fact  
misrepresented,
- 3 (4) justifiable reliance on the misrepresentation, and
- 4 (5) resulting damages.
- 5

6 *Id.* See *Small v. Fritz Companies, Inc.*, 30 Cal. 4th 167, 173-174  
7 (2003).

8 *In re Still*, 393 B.R. 896, 916 (Bankr. C.D. Cal. 2008). As  
9 with other negligence claims, Plaintiff-Debtors must also show that  
10 the defendant breached a legal duty by giving the  
11 misrepresentations. *Eddy v. Sharp*, 199 Cal. App. 3d 858, 864  
12 (1988).

13 Bank of America, N.A. asserts that the Plaintiff-Debtors have  
14 failed to allege that the Bank had a duty to postpone the  
15 foreclosure sale, and therefore a claim for Negligent  
16 Misrepresentation is not pled. This misstates the duty which is at  
17 the basis of the alleged Negligent Misrepresentation. The  
18 Plaintiff-Debtors have alleged that Bank of America, N.A., in their  
19 contractual relationship, chose to represent that the foreclosure  
20 sale would be postponed. As argued by Bank of America, N.A., it  
21 may well of had the right to just proceed with the nonjudicial  
22 foreclosure sale. However, it is alleged that Bank of America,  
23 N.A. chose to represent to the Plaintiff-Debtors that it would not  
24 proceed with the nonjudicial foreclosure sale on December 27, 2010,  
25 and the Plaintiff-Debtors relief on that representation.

26 It is well established that every contract imposes on the  
27 parties a duty of good faith and fair dealing in the performance  
28 and enforcement of the contract. *Foley v. Interactive Data Corp.*,

1 47 Cal. 3d 654, 683-684 (Cal. 1988). Generally, that duty is the  
2 basis for a party seeking a remedy under the contract, not as the  
3 basis for a tort remedy. *Id.* However, as stated in 6 WITKIN SUMMARY  
4 OF CALIFORNIA LAW, TENTH EDITION, TORTS, § 831, negligence is either the  
5 omission of a person to do something which an ordinarily prudent  
6 person would have done under given circumstances or the doing of  
7 something which an ordinarily prudent person would not have done  
8 under the circumstances. In general, all persons are to use  
9 ordinary care to prevent others from being injured as a result of  
10 such persons' conduct. *Rowland v. Christian*, 69 C.2d 108 (Cal.  
11 1968). Thus, where a person chooses to make statements, though  
12 honestly believed to be true, but which are not based on reasonable  
13 grounds for such belief, liability may exist for negligent  
14 misrepresentation. 5 WITKIN SUMMARY OF CALIFORNIA LAW, TENTH EDITION,  
15 Torts § 818.

16 In addition to the contractual obligation to deal with the  
17 Plaintiff-Debtors in good faith and deal with them fairly, Bank of  
18 America, N.A. had an obligation not to misrepresent material facts  
19 to them. It is alleged that this duty not to misrepresent  
20 materials facts upon which the Plaintiff-Debtors would reasonably  
21 rely is what has been breached. Applying the pleading standard  
22 under Rule 9(b), Plaintiff-Debtors' First Amended Complaint is  
23 sufficient to allege that Bank of America, N.A. breached a duty,  
24 other than its contractual duty to the Plaintiff-Debtors.

25 Therefore, the Motion to Dismiss the Second Cause of Action  
26 for Negligent Misrepresentation is denied.

27 **Unfair Business Practices - Third Cause of Action**

28 Citing the same three statements as the previous two claims as

1 the basis for this cause of action, Plaintiff-Debtors contend that  
2 Bank of America, N.A. violated California Business and Professions  
3 Code section 17200, describing their loan modification program as  
4 "immoral, unethical, oppressive, unscrupulous, and substantially  
5 injurious to consumers." FAC ¶ 33. Section 17200 provides that  
6 unfair business practices include, "any unlawful, unfair or  
7 fraudulent business act or practice and unfair, deceptive, untrue  
8 or misleading advertising and any action prohibited by Chapter 1  
9 (commencing with Section 17500)." Section 17500 includes "false or  
10 misleading statements."

11 Bank of America, N.A. argues that Plaintiff-Debtors have  
12 failed to show fraudulent practices since they have failed to show  
13 justifiable reliance. However, "The 'fraud' prong of the Business  
14 and Professions Code section 17200 is unlike common law fraud or  
15 deception. A violation can be shown even if no one was actually  
16 deceived, relied upon the fraudulent practice, or sustained any  
17 damage. Instead, it is only necessary to show that members of the  
18 public are likely to be deceived." *Podolsky v. First Healthcare*  
19 *Corp.*, 50 Cal. App. 4th 632, 647-48 (1996) (citing *Committee on*  
20 *Children's Television, Inc. V. General Foods Corp.*, 35 Cal. 3d 197,  
21 211 (1983)). Still, Plaintiff-Debtors have failed to meet this  
22 standard since they do not show that Bank of America, N.A.'s  
23 conduct is something that will likely deceive the public. In their  
24 First Amended Complaint, Plaintiff-Debtors allege that there has  
25 been a pattern of similar actions by Bank of America, N.A. against  
26 other consumers but they fail to plead with particularity facts  
27 supporting this allegation.

28 Bank of America, N.A. also argues that Plaintiff-Debtors have

1 failed to identify any laws that Bank of America, N.A.'s conduct  
2 violated and therefore have failed to state a claim for unlawful  
3 business practices. However, "A practice can violate this section  
4 even if it is merely unfair and not unlawful." *Mangindin v. Wash.*  
5 *Mut. Bank*, 637 F. Supp. 2d 700, 709 (N.D. Cal. 2009). "In  
6 determining whether a particular business practice is unfair under  
7 Section 17200, the court must weigh the utility of the defendant's  
8 conduct against the gravity of the harm to the alleged victim." *Id.*  
9 at 710. Bank of America, N.A., though, argues in both its Points  
10 and Authorities and its Reply to Plaintiff-Debtors' Opposition  
11 that, quoting *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1166-  
12 67 (2000), "any claims of unfairness under the UCL should be  
13 defined in connection with a legislatively declared policy."  
14 However, this quote cites back to the decision in *Cel-Tech*  
15 *Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.  
16 4<sup>th</sup> 163, 286 (Cal. 1999), with respect to the unfair competition  
17 component of § 17200, not the unfair practices.

18 However, the pleading of a claim under Business and  
19 Professions Code § 17200 et. seq. is more than that there must be  
20 some unfair business practice and the plaintiff wants relief under  
21 § 17200. The Third Cause of Action includes a statement that the  
22 Bank of America, N.A. loan modification program, "as detailed  
23 above," is an immoral, unethical, oppressive, unscrupulous, and  
24 substantially injurious to consumers. First Amended Complaint ¶33.  
25 However, the First Amended Complaint does not include any  
26 allegations about the Bank of America, N.A. loan modification  
27 program. Rather, it is alleged that representatives of Bank of  
28 America, N.A. stated that the December 27, 2010 foreclosure sale



1 was to be postponed, and it was not postponed. There is nothing  
2 alleged about the loan modification program by which this court  
3 could conclude that a plausible claim under Business and  
4 Professions Code § 17200 et. seq. is stated in the First Amended  
5 Complaint.

6 Therefore, the Motion is granted and the Third Cause of Action  
7 is dismissed as to Bank of America, N.A., without leave to amend.

8  
9 **Set Aside, Rescind, or Cancel Trustee's Deed - Fifth  
Cause of Action**

10 Plaintiff-Debtors request that the court rescind the Trustee's  
11 Deed based on Bank of America, N.A. intentionally misrepresenting  
12 that the foreclosure sale would not occur. Bank of America, N.A.  
13 argues that Plaintiff-Debtors have failed to state a recognizable  
14 cause of action since they fail to allege any known action besides  
15 intentional misrepresentation. However, the California Civil Code  
16 provides that, "In any transaction involving residential real  
17 property in foreclosure . . . which is in violation of Section  
18 1695.13 is voidable and the transaction may be rescinded by the  
19 property owner within two years of the date of the recordation of  
20 the conveyance of the residential real property in foreclosure."  
21 Cal. Civ. Code § 1695.14. California Civil Code section 1695.13  
22 provides that, "It is unlawful for any person to initiate, enter  
23 into, negotiate, or consummate any transaction involving  
24 residential real property in foreclosure . . . if such person, by  
25 the terms of such transaction, takes unconscionable advantage of  
26 the property owner in foreclosure."

27 However, assuming that Plaintiff-Debtors were seeking relief  
28 under §1695.13, Plaintiff-Debtors have plead a claim for fraud,

1 which is a violation of California Civil Code section 1695.13.  
2 They further allege that Pacific Crest was informed of the pending  
3 loan modification and that Bank of America, N.A. could not proceed  
4 with a foreclosure sale. They have adequately pled their claims of  
5 fraud or negligent misrepresentation, and that based on their  
6 reliance on the representations, Bank of America, N.A. and Pacific  
7 Crest proceeded with the foreclosure sale. It is clear from the  
8 pleadings, alleging that property worth \$450,000.00 was purchased  
9 by Pacific Crest for \$190,000.00, that unconscionable advantage is  
10 alleged to have been taken of the Plaintiff-Debtors by reliance on  
11 representations that the nonjudicial foreclosure sale would be  
12 postponed.

13 This First Amended Complaint asserts that neither Bank of  
14 America, N.A. nor Pacific Crest participated in the nonjudicial  
15 foreclosure sale in good faith, without notice that the sale was  
16 not to occur. There was a representation, which is alleged to be  
17 known by Bank of America, N.A., Pacific Crest, and Mudgett, that  
18 the Plaintiff-Debtors had been told that the foreclosure sale was  
19 to be postponed. Actual events may show, if the representation is  
20 proven, that the misrepresentation led to the Plaintiff-Debtors  
21 being misled and Pacific Crest participating in the sale through  
22 which it now asserts to own the Property. See *Rogers v. Warden*, 20  
23 Cal. 2d 286 (Cal. 1942).

24 Contrary to Bank of America, N.A.'s contention, the ruling of  
25 the District Court of Appeals does not result in precluding the  
26 Plaintiff-Debtors from attempting to rescind the deed from a  
27 nonjudicial foreclosure sale based on fraud that was known by both  
28 the lender and the purchaser at the foreclosure sale. In *Melendrez*

1 v. *D&K Investment, Inc.*, 127 Cal. App. 4<sup>th</sup> 1238,1250 (6th App. Dist.  
2 2005), which is cited in the *Malbry* decision relied on by Bank of  
3 America, N.A., the conclusive presumption is that a nonjudicial  
4 foreclosure sale exists for bona fide purchasers without knowledge  
5 of a defect in the sale. The purchaser must not have knowledge of  
6 the rights of the other party. *Id.*, 1251. Here, it is alleged  
7 that both Bank of America, N.A. and Pacific Crest knew that the  
8 foreclosure sale was not to be conducted on December 27, 2010.

9 The Motion is denied as to the Fifth Cause of Action to  
10 Rescind the trustee's deed to Pacific Crest.

11 **Quiet Title - Sixth Cause of Action**

12 Plaintiff-Debtors seek to quiet title as to the Property as of  
13 December 27, 2010, the day of the foreclosure sale, presumably  
14 based on the argument that the sale was unlawfully held. Bank of  
15 America, N.A. argues that Plaintiff-Debtors cannot bring a claim of  
16 quiet title since they have failed to tender. Generally, when  
17 attacking a foreclosure sale, the trustor-debtor must tender the  
18 amount he or she owes on the note. *Arnolds Management Corp. v.*  
19 *Eischen*, 158 Cal. App. 3d 575, 578 (1984). However, if a  
20 foreclosure sale is void or it is otherwise inequitable, the tender  
21 requirement may be waived. *Standley v. Knapp*, 113 Cal. App. 91,  
22 102 (1931); *Humboldt Sav. Bank v. McCleverty*, 161 Cal. 285, 291  
23 (1911); see also 4 MILLER & STAR CALIFORNIA REAL ESTATE § 10:212 (3d  
24 ed.). Therefore, to the extent the Ulbergs properly allege that  
25 the foreclosure was procured through fraud or that the sale is void  
26 as defective, then they are not required to tender.

27 Plaintiff-Debtors have alleged a simple and particular ground  
28 upon which their claim of ownership is based - the

1 misrepresentation that the foreclosure sale was to be postponed.  
2 Additionally, they allege that the foreclosure sale was improperly  
3 conducted in violation of HAMP. Further, that both Bank of  
4 America, N.A. and Pacific Crest were aware of these defects. By  
5 virtue of these defects, the Plaintiff-Debtors assert that their  
6 interest in the Property, which is now property of the bankruptcy  
7 estate, is superior to that of Pacific Crest, which acquire its  
8 interest from Bank of America, N.A.'s trustee under the deed of  
9 trust.

10 The Motion to dismiss the Sixth Cause of Action for Quiet  
11 Title is denied.

12 **Declaratory Relief - Seventh Cause of Action**

13 Plaintiff-Debtors seek Declaratory Relief to determine their  
14 rights and duties as to Defendants, as well as who owns the title  
15 to the Property. Bank of America, N.A. argues that declaratory  
16 relief is not a recognized cause of action and is partially  
17 correct. A plaintiff cannot bring a cause of action for  
18 declaratory relief by itself. Still, a plaintiff can bring a claim  
19 for declaratory relief when it is attached to an actual issue of  
20 controversy. 3 MOORE'S FEDERAL PRACTICE § 57.22[1](3d ed. 2011).  
21 Plaintiff-Debtors contend that there is a controversy over who is  
22 the holder of title to the Property. However, the relief sought  
23 under this cause of action is already addressed by Plaintiff-  
24 Debtors' Quiet Title Claim. "If there is no actual controversy,  
25 there is no discretionary action that a court can take." *Id.*  
26 Also, "a claim for declaratory relief is unnecessary where an  
27 adequate remedy exists under some other cause of action."  
28 *Mangindin*, 637 F. Supp. 2d at 707.

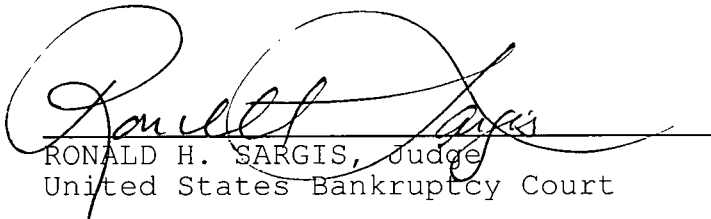
1 Since Plaintiff-Debtors have already brought a quiet title  
2 claim against the Defendants, the relief sought by this cause of  
3 action can be addressed by another claim and there is no  
4 controversy the court can remedy through declaratory relief.  
5 Therefore, this cause of action is dismissed without prejudice and  
6 without leave to amend.

7 **CONCLUSION**

8 Plaintiff-Debtors fail to plead their claims alleging  
9 violation of California Business and Professions Code § 17200 et.  
10 seq. and for Declaratory Relief with the necessary particularity.  
11 Accordingly, the Motion to Dismiss is granted as to Plaintiff-  
12 Debtors' Third and Seventh Causes of Action and denied as to  
13 Plaintiff-Debtors' First, Second, Fifth, and Sixth Causes of  
14 Action. No relief was requested as to the Fourth Cause of Action.

15 This Memorandum Opinion and Decision constitutes the court's  
16 findings of fact and conclusions of law. A separate order shall be  
17 issued consistent with the ruling in this decision.

18 Dated: November 29, 2011

19  
20   
21 RONALD H. SARGIS, Judge  
22 United States Bankruptcy Court  
23  
24  
25  
26  
27  
28

This document does not constitute a certificate of service. The parties listed below will be served a separate copy of the attached document(s).

---

Adam Barasch  
1 Embarcadero Center #2600  
San Francisco, CA 94111

John Downing  
10069 W River St #6C  
Truckee, CA 96161

Scott CoBen  
1214 F St  
Sacramento, CA 95814

Recontrust, N.A.  
Attn: Officer, Managing or General Agent for Service  
1800 Tapo Canyon Rd  
Simi Valley, CA 93063

G. Wendell Ulberg  
PO Box 1024  
Tahoe City, CA 96145

Kathleen Ulberg  
PO Box 1024  
Tahoe City, CA 96145

David Cusick  
PO Box 1858  
Sacramento, CA 95812-1858

Office of the U.S. Trustee  
Robert T Matsui United States Courthouse  
501 I Street, Room 7-500  
Sacramento, CA 95814